Paper No. 9

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

_____

Ex parte LESLIE AMMANN JR.

_____

Appeal No. 2001-2512
Application No. 09/248,742

_____

ON BRIEF

_____

Before MCQUADE, NASE, and CRAWFORD, Administrative Patent Judges.
CRAWFORD, Administrative Patent Judge.

Decision on Appeal

This is a decision on appeal from the examiner's final rejection of claims 8, 9 and 11 through 19. Claims 1 through 7 have been allowed and claim 10 has been objected to.

The appellant's invention is a folding chair which rotates between a first position for carrying the folding chair and a second position for sitting. An understanding of the invention can be derived from a reading of exemplary claim 8 which appears in the appendix to the appellant's brief.

The prior art

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Batie et al. (Batie)	3,077,327	Feb. 12, 1963
Fanslau et al. (Fanslau)	4,527,829	July 9, 1985
Bradbury	4,676,548	June 30, 1987
Rettenberger	5,722,717	March 3, 1998
Amato	3,895,839	July 22, 1975

The rejections

Claims 8, 9 and 14 stand rejected under 35 U.S.C. § 103 as being unpatentable over Batie in view of Fanslau.

Claim 16 stands rejected under 35 U.S.C. § 103 as being unpatentable over Rattenberger in view of Bradbury.

Claims 16 and 19 stand rejected under 35 U.S.C. § 103 as being unpatentable over Batie in view of Bradbury.

Claims 11 and 15 stand rejected under 35 U.S.C. § 103 as being unpatentable over Batie in view of Fanslau and Bradbury.

Claims 12 and 13 stand rejected under 35 U.S.C. § 103 as being unpatentable over Batie in view of Fanslau and Amato.

Claims 17 and 18 stand rejected under 35 U.S.C. § 103 as being unpatentable over Batie in view of Bradbury and Amato.

Claims 17 and 18 stand rejected under 35 U.S.C. § 103 as being unpatentable over Rettenberger in view of Bradbury and Amato.

Rather than reiterate the conflicting viewpoints advanced

by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer (Paper No. 8) for the examiner's complete reasoning in support of the rejections, and to the brief (Paper No. 7) for the appellant's arguments thereagainst.

Opinion

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

We turn first to the rejection of claims 8, 9 and 14 under 35 U.S.C. § 103 as being unpatentable over Batie in view of Fanslau. In the examiner's view, Batie teaches all of the elements of the invention except for the use of a headrest having a head supporting surface. The examiner relies on Fanslau for teaching a chair with a headrest hingedly connected to a back support frame and a headrest which has a head supporting surface which lies within the back supporting frame when the chair is folded.

The examiner concludes:

> It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the chair of Batie et al., with the headrest of Fanslau et al., in order to provide more head support and comfort to an occupant of the chair. [answer at pages 3 and 4]

Appellant argues that the headrest disclosed in Fanslau is not attached to the chair so that in the closed position the headrest is mounted "within" or inside the back support frame and in the open position is supported by the back support frame. We find ourselves in agreement with the appellant that in Figure 3, which depicts the closed position of the chair, the headrest of Fanslau does not lie "within" or inside the back support frame. As such, we will not sustain the rejection as it is directed to claim 8 and claims 9 and 14 dependent therefrom.

We turn next to the examiner's rejection of claims 11 and 15 under 35 U.S.C. § 103 as being unpatentable over Batie in view of Fanslau and Bradbury. Claims 11 and 15 are dependent on claim 8. We have reviewed the disclosure of Bradbury, and find that Bradbury does not cure the deficiencies noted above for Batie and Fanslau. Therefore, we will not sustain this rejection for the same reasons stated above in connection with the rejection of claim 8 over Batie in view of Fanslau.

We turn next to the examiner's rejection of claims 12 and 13 under 35 U.S.C. § 103 as being unpatentable over Batie in view of Fanslau and Amato. Claims 12 and 13 are dependent on claim 8.

We have reviewed the disclosure of Amato, and find that Amato does not cure the deficiencies noted above for Batie and Fanslau.

We will not sustain this rejection for the same reasons as stated above in connection with the rejection of claims 8 over Batie and Fanslau.

We turn next to the examiner's rejection of claims 16 and 19 as being unpatentable over Batie in view of Bradbury. The examiner finds that Batie discloses essentially the invention as claimed except the use of a storage means connected to a back support frame.[1] Bradbury is relied on for disclosing a storage means connected to a back support frame. The examiner concludes:

> It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the chair of Batie et al., with the storage means and shoulder strap means and the connecting means of Bradbury, in order to provide more stability, storage space and better transport of the chair. [answer at page 5]

Appellant argues that it would not have been obvious to combine the teachings of Batie and Bradbury because Batie discloses a three frame folding chair and Bradbury discloses a lawn chair and it would not be obvious to transfer the structures of one chair type to the other. Specifically, the appellant argues that were a backpack placed on the back of the Batie chair, the chair would

[1] The examiner also found that Batie does not disclose means for removably connecting the support frames, shoulder strap means and connecting means.

fall backward unless the backpack has a very small weight compared to the rest of the chair.

We do not agree with the appellant that the Batie chair would fall over backwards because of the weight of the backpack. We note that claims 16 is broad enough to cover an empty backpack. In addition, the appellant has not submitted any evidence to establish that the Batie chair would fall over if a backpack were attached. It is well established that arguments of counsel can not take the place of evidence. In re Pearson, 495 F.2d 1399, 1405, 181 USPQ 641, 646 (CCPA 1974). Therefore, we will sustain this rejection as it is directed to claim 16. We will also sustain this rejection as it is directed to claim 19 as this claims stands or falls with claim 16 as appellant has not argued the separate patentability of claim 19. See In re Nielson, 816 F.2d 1567, 1572, 2 USPQ2d 1525, 1528 (Fed. Cir. 1987).

We turn next to the examiner's rejection of claims 17 and 18 under 35 U.S.C. § 103 as being unpatentable over Batie in view of Bradbury and Amato.

In response to this rejection, appellant argues that the Batie chair would fall if a backpack were attached to the back of the Batie chair. We will sustain this rejection for the same reasons

stated above for the rejection of claims 16 and 19 over Batie in view of Bradbury.

We turn next to the examiner's rejection of claim 16 as being unpatentable over Rettenberger in view of Bradbury. The examiner is of the opinion that Rettenberger discloses all of the elements of the invention of claim 16 except the use of a backpack (or storage means) joined directly to the back support frame. The examiner relies on Bradbury for teaching the conventional use of a backpack that is directly joined to a back support frame. The examiner concludes:

> It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the chair of Rettenberger, to have a backpack on the back support frame, a shoulder strap means and connection means, as taught by Bradbury, in order to provide additional storage means and a more comfortable way of transporting the chair. [answer at page 4]

The appellant argues that because Rettenberger discloses of a three-frame folding chair and Bradbury discloses a lawn chair, it would not have been obvious to transfer the structures of one chair type for the other because the Rettenberger chair would fall over backwards because of the weight of the Bradbury backpack.

We do not agree with the appellant that the Rettenberger chair would fall over backwards because of the weight of a backpack. We note that claim 16 is broad enough to cover an empty storage means

or backpack. In addition, the appellant has not submitted any evidence to establish that the Rettenberger chair would fall over if a backpack were attached. It is well established that arguments of counsel can not take the place of evidence. Pearson at 495 F.2d 1405; 181 USPQ at 646.

In view of the foregoing, we will sustain the examiner's rejection of claim 16 as being unpatentable over Rettenberger in view of Bradbury.

We turn next to the examiner's rejection of claims 17 and 18 over Rettenberger in view of Bradbury and Amato. Appellant, in response to this rejection, argues that it would not be obvious to combine the Rettenberger chair with the Bradbury back pack because Bradbury teaches a lawn chair style folding chair and Rettenberger discloses a three frame folding chair and it would not be obvious to transfer the structure of one chair type to the other. The appellant also argues that were the back pack disclosed in Bradbury put on the back of the Rettenberger chair, the Rettenberger chair would fall backward.

We will sustain this rejection for the same reasons as stated above for the rejection of claim 16 over Rettenberger in view of Bradbury.

In summary,

The examiner's rejection of claims 8, 9 and 14 under 35 U.S.C. § 103 as being unpatentable over Batie in view of Fanslau is not sustained.

The examiner's rejection of claim 16 under 35 U.S.C. § 103 as being unpatentable over Rettenberger in view of Bradbury is sustained.

The examiner's rejection of claims 16 and 19 under 35 U.S.C. § 103 as being unpatentable over Batie in view of Bradbury is sustained.

The examiner's rejection of claims 11 and 15 under 35 U.S.C. § 103 as being unpatentable over Batie and Fanslau in view of Bradbury is not sustained.

The examiner's rejection of claims 12 and 13 under 35 U.S.C. § 103 as being unpatentable over Batie in view of Fanslau and Amato is not sustained.

The examiner's rejection of claims 17 and 18 under 35 U.S.C. § 103 as being unpatentable over Batie in view of Bradbury and Amato is sustained.

The examiner's rejection of claims 17 and 18 under 35 U.S.C.

§ 103 as being unpatentable over Rettenberger in view of Bradbury and Amato is sustained.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

Affirmed-in-Part

JOHN P. MCQUADE Administrative Patent Judge	)	
JEFFREY V. NASE Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
MURRIEL E. CRAWFORD Administrative Patent Judge	)	

MEC/jrg

ERIC K. KARICH
905 TURNBERRY DRIVE
MANSFIELD, TX 76063